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**MEMORANDUM TO THE COMMITTEE OF COUNSEL**

Penn Advertising's counsel has told us that preparations to challenge the Baltimore cigarette billboard advertising ban have been put on hold for the moment because existing contracts are not affected by the ordinance so there is no practical urgency, while the District Court's recent adverse ruling on Penn's challenge to Baltimore's alcohol billboard advertising ban does require immediate attention. A copy of the court's decision in that case, issued on March 28, is attached.

Treating the City's motion to dismiss as a motion for summary judgment, Judge Hargrove ruled that the alcohol advertising ban did not violate the First Amendment. Although he recognized the City's obligation, under Edenfield v. Fane, 113 S. Ct. 1792 (1993), to "demonstrate that the harms [the City] recites are real and that its restrictions will in fact alleviate them to a material degree," Judge Hargrove essentially took judicial notice of the "fact" that advertising increases consumption and that banning advertising is a reasonable means of reducing consumption.

Penn and Anheuser-Busch, which also challenged the ban, will argue in the Fourth Circuit that (1) it was reversible error for the District Court to convert their motion to dismiss into a motion for summary judgment *sua sponte* and without notice to the parties, (2) summary judgment was inappropriate because there are material facts in dispute and (3) the District Court reached the wrong conclusion on the merits. Eric Ruben, Penn's lawyer, says that advertising groups are being approached to mount an amicus effort in the Fourth Circuit.

David H. Remes

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